88-1041

Supreme Court, U.S.
FILED
DEC 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

In The
SUPREME COURT OF THE UNITED STATES

October Term 1988

IRVIN JAMES HUNTZINGER,
Petitioner

v.

THE HONORABLE JOHN O. MARSH, JR.
Secretary of the Army, et. al.,
Appellee(s)

On Appeal From The

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA

Petition for:

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FOURTH CIRCUIT

Counsel for the Petitioner
IRVIN J. HUNTZINGER, Pro Se
18 Tree Haven Lane
Stafford, VA 22554-6406
(703) 752-1060

Counsel for Respondent
Ms PAULA MARY POTOCZAK, Esquire
Assistant United States Attorney
701 Prince Street
Alexandria, VA 20530
(703) 557-1900

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Fourth Circuit decided, PER CURIAM: "that the Districts Court's order holding Petitioner' suit to be barred by res judicata" did err.

Question Presented for Review.....i

Opinion of the Court(s) Below.....1

Statement of Jurisdiction.....1

Statement of the Case.....2

Reason for the Writ.....3

Argument:

CASE NO. 1. Filed U.S. Cl Ct for reinstatement active duty US Army with constructive promotion and back pay. Complaint was for the illegal, wrongful, fraudulent "SHAM" separation without procedural due process, violation US Code(s) and Constitutional guaranteed rights by "hoodwinking" thru concealment coverup, deception, lies in response to Congressional Inquiries, and fraudulent actions classified within Inspector General "SEQUESTERED" records privileged under Federal Law (USC) and Uniform Code of Military Justice; therefore, Petitioner had no reason to suspect or knowledge of the secret personnel action taken. Decided barred by "untimely

filed." Merits not in dispute.

CASE NO. 2. Filed U.S.D.C. for E.D. of VA attacking the Administrative Procedures "NEWLY DISCOVERED" thru Freedom of Information (FOIA) and Privacy Act(s) inquires S U B S E Q U E N T to Case No. 1 acts of mal feasence and negligence by Secretary Army and his appointed Army Board for Correction of Military Records (ABCMR); therefore ATTACKED THE ADMINISTRATIVE PROCEDURES AND NEGLECT whereby one person, Paralegal Specialist appointed Examiner acts as: Prosecutor, Judge, Jury, Executioner---NOT deniedbyDefendant(s)-Appellee..... 5

CONCLUSIONS: Case No. 2 is different in facts, issues, law application, arguments, and substantial matter NEWLY acquired DISCOVERED-FOIA..... 8

THEREFORE, is not res judicata..... 9

APPENDIX-INDEX..... 10

CERTIFICATE OF SERVICE..... APX.. 92

OPINION OF THE COURTS BELOW

SEP 19, 1988 in the US Ct of Appeals for the 4th Cir case no. 88-3535 IRVIN J HUNTZINGER, Appellant v. JOHN O. MARSH, Jr., Secretary of the Army, et al., Appellee(s), ORDER was entered denial REH'G (Apx 1); MOTION petition for reh'g no. 88-3535 dtd SEP 2, 1988 (Apx 2). DECISION decided MAR 24, 1988 per curiam: barred by res judicata (Apx 3); Appealed from U.S.D.C. for E.D. of VA ORDER filed MAR 1, 1988 (Apx 4); with attached MEMO OPN dtd MAR 1, 1988, "it appears that res judicata bars plaintiff's claim (Apx 5).

STATEMENT OF JURISDICTION

The United States Court of Appeals for the 4th Cir (Appeal No 86-3535) affirmed denial reh'g SEP 19 1988 of the US D.C. for E.D. of VA (C/A No 87-1040-A) order holding his suit to be barred by res judicata.

Jurisdiction of Writ of Certorari is invoked under RULE 17 .1. (a) and (c) in

that questions raised in Case No. 2 are entirely based on different facts of question based on newly "discovered" facts with different issues, different arguments, and the court(s) below decided on basis in conflict with other opinions of the Courts and this Supreme Court decisions.

STATEMENT OF THE CASE

That the Secretary of the Army is responsible for malfeasence and negligence within his office and appointed Board(s); Whereby, one person, in this case, a Paralegal Sepcialist (Military Personnel) sets as: PROSECUTOR, JUDGE, JURY, AND EXECUTIONER WITH APPROVAL OF HIS OWN FINDINGS AND RECOMMENDATIONS by signing-off for the Secretary of the Board and Secretary Army NOT denied by Defendants; without judical review. These findings were adopted by Counsel for Defendants and on presentation to the Court were accepted as fact by the Court and in effect,

accepted as Judical notice, though they are defective, were basis for the Court(s) decision/sustaining "untimely filed", merits not in dispute; and, denial Petitioner's right of Discovery, Deposition and Admissions preventing pursuit of tort fraud and neglect in previous case; and denial correction of defective facts. Petitioner SUBSEQUENTLY acquired thru discovery pursuant FOIA, NEW different facts which upon declassification were released.

Petitioner's opinion, he is being treated differently and his case treated as "friviolous" becuase he is pro se -- further fact that in his opinion the US D.C. for E.D. of VA Court's Memo of Opinion (Pg. 3) cite of:

Kenny v. Quigg, 830 F. 2d 665, 669 (4 Cir) by US D.C. for E.D. of VA is in err.

REASON FOR THE WRIT

For reasons contained within this petition to resolve the US D.C. for E.D.

of VA opinion stating that current case No. 2 based on NEWLY acquired discovered FOIA material with different issues, arguments and substance is barred by re judicata; appealed to 4th Cir Ct confirmed finding basis of no fault in the district courts opinion of res judicata within prior case of:

"HUNTZINGER v. UNITED STATES, 9 Cl Ct 90 (1985) aff'd 809 F. 2d 787 (Fed Cir 1986), cert denied 107 S Ct 3267 (1987) reh'd denied 108 S Ct 32 (1987) Cl Ct."

which was found barred by statute of limitations..."material facts are not in dispute." Denied discovery, deposition andadmissions;therefore,could notpre-viously "pursue" the facts, issues--of mal feasence and negligence--Courts now endeavor to bar by res judicata; there-by, the need to invoke the authority of this Supreme Court's review.

ARGUMENT

That case No. 2 is different by "substantive law" with different pleadings and different arguments than case No. 1 based on NEWLY ACQUIRED INFORMATION pursuant to FOIA. DISCOVERY of facts supporting the attacking of the Administrative process with entirely different argments with different issues--Law.

Res judicata "is not" applicable in this case before the Court based upon NEWLY discovered fact pursuant FOIA of new substance basis of "NEW" different argument, issues, application of law and error contained in the Secretary Army BCMR administrative procedures whereby the Examiner expresses in his memo of consideration (1985) bias, prejudice and sat as: Prosecutor, Judge, Jury and Executioner without judicial review, by default, of proper authority. The Examiner, a "paralegal specialist", authenicated his own report of findings

and recommendations for the Secretary of the Board and Secretary Army violation governing USC and directives (Regulatory) not denied by defendants. Therefore, this case attacks the administrative process Secretary Army's negligence and malfeasence.

Previous case No. 1 (Apx 10/11) was a military pay case litigated on basis of the illegal, wrongful and fraudulent separation action by "SHAM" without "due procedural process" and violations of guaranteed Constitutional rights under I,V,VII, VIII and XIVth Amendments concealed within "privileged" IG records (Apx 9) under USC and Military Code of Military Justice (Apx 10) which petitioner was not informed of nor discoverable and access was (is) denied by law. Member of Congress were deceived by lies in response to then inquires in confirming reports pursuant ADB "annual screening" decision.

That the Government's Solicitor General opposed case No. 1 basis "frivolous" and unimportant to consume the time of this Honorable Supreme Court and apparently the Courts in case No. 2 are pursuing that line of reasoning in treating Petitioner differently becuase he is pro se, when in fact there is a flaw in the law and different matters at issues.

There are conflicts in Court(s) application of law in the following cases which reflect other violations of military regulations claimed, which appear to be similar in nature:

CHAPPELL v. WALLACE, 462 US 297, 103 S Ct 2362, 2366 (1983) grievances military personnel 10 USC Sec 938, 1552 before BCMR;

COLSON v. BRADLEY, 477 F 2d. 639 (8th Cir 1973) failure to follow their own regulations;

MINDES v. SEAMAN 453 F 2d 197 (5th Cir 1971) 453 F 2d at 201;

SMITH v. NIXON, 606 B 2d 1183, 1191 D.C. Cir (1979) cert. denied 453 US 912 (1981);

WILLIAMS v. WILSON, 762 F 2d 357 (4th Cir 1985) violations of

military regulations claimed.

Petitioner's opinion, in summary that the above gives credence in the justification of invoking this Supreme Court's intervention rendering guidance in deciding the issues now before this Honorable Supreme Court regarding res judicata involving two different cases with different facts and arguments contained in the record as acquired thru NEWLY FOIA responses.

CONCLUSIONS

Case No. 1 was for reinstatment of illegal, wrongful and fraudulent separation "SHAM" concealed thru deception and fraudulent means by filing the "secret" personnel actions with "sequestered" records, privileged, without knowledge/or advise of the Complainant and right of deposition, discovery, admissions denied.

Case No. 2 is a different case attacking the Secretary Army of malfeasence and negligence in allowing

one paralegal specialist, ABCMR appointed EXAMINER sit as: PROSECUTOR, JUDGE, JURY AND EXECUTIONER approving his own findings and recommendations by signing of and for the Board Secretary and Secretary Army as approval authority, in denial of hearing; not denied by Defendants a violation of Army Regulatory directives and US Code and without judicial review.

THEREFORE: res judicata "is not" applicable and Appellant must prevail on the basis that the merits were not in dispute (in either case) nor denied by Defendants.

DATED:

DEC 14th, 1988

Irvin J. Huntzinger
Pro Se

APPENDIX/INDEX

1 On Motion For Rehearing: order; US Ct of Appeals for the 4th Circuit, No 88-3535, filed Sept 19, 1988, Rehearing is denied. 00

2 Motion; Appellant, Petition for Rehearing, No. 88-3535, dated Sept 2, 1988. 01

3 Decision; US Ct of Appeals for 4th Cir, No. 88-3535, decided Mar 24, 1988, Per Curiam: barred by res judicota. 16

4 Order, in the US Dist Ct for the Eastern Dist of VA, No. 87-1040A, filed Mar 1, 1988; attached: Memo of Opinion 18

5 Memo of Opinion, attached 19

6 Motion; in the US Dist Ct for the Eastern Dist of VA, Alex., VA, No 87-1040A, "Transmitted document omitted from the Record" with attached 25

7 DA Form, Job Description No. 5795, Office Secretary of the

Army, "Paralegal Specialist (Military Personnel)" 29

8 Update Inspector General Regulation, (AR) 20-1 para 1-30, Release, use, and amendment of IG records and reports and other records and reports. 34

9 UCMJ Extract, para 151, Privileged and non-privileged communication para 151c. 37

Case No. 1

10 Complaint; US Cl Ct, 317-85C, May 28, 1985. (Opinion(s), Appeal(s), etc Contained in Case No. 86-1801 to the Supreme Ct of the US, Oct Term 1986, dated 26 Mar 1987) 39

11 Complaint Amendment; US Cl Ct 317-85C, May 29, 1985. In the US Cl Ct 317-85C, Aug 30, 1985 50

12 Order US Cl Ct, No 317-85C denied, deposition & discovery filed, Aug 30, 1985 54

Case No. 2

13 Complaint; US Dist Ct for the Eastern Dist of VA, Alex, VA, 87-1040A, Oct 15, 1987 55

14 Informal Brief, (Issues presented), US Ct of Appeals for the 4th Cir, 88-3535, Apr 27, 1988 66

APPENDIX

U. S. COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-3535

Filed

Irvin J. Huntzinger SEP 19, 1988

Plaintiff - Appellant,

v.

John O. Marsh, etc.,

Defendant - Appellee

On Petition for Rehearing

Upon consideration of appellant's pro se petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Wilkins, for a panel composed of Judge Hall, Judge Wilkins, and Senior Judge Butzner.

For the Court

s/s John M. Greegen

Clerk

00000

Huntzinger v. Marsh
88-2525

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
FOURTH CIRCUIT

IRVIN J. HUNTZINGER, (703) 752-1060 18 Tree Haven Lane STAFFORD, VA 22554-6406 Appellant v. HON. JOHN. O MARSH, JR. Sec. of the Army; and HQS, DEPT OF ARMY et al Pentagon, Arlington, VA 22310 Appellee(s)	APPEAL CASE NO 88-3535 CIVIL ACTION NO.: 87-1040-A US D..C., East Div., Alex., VA.

MOTION
PETITION FOR REHEARING (FRAP 40)

Appellant Huntzinger hereby prays for "Petition for Rehearing (FRAP 40)', invoking within my appeal (NOT previously aware of) the "1871 Rights Act"; and, Section 1983 Title 42 of the US Code protecting "all constitutional rights". Current Opinions of the Courts in "Fraud, Concealment etc" of Gov. Contractors.

In light of the Court's acceptance of documents, previously denied, that confirm endeavor of "discovery deposition and admissions" which on

motion of the Government were denied, case no 1, which such government records confirm the deception, coverup, concealment of il-legal, wrongful, and fraudulent act(s) in denial of procedural due process under the Government's Regulatory directives, US Code, and Constitutional rights, "SHAM" of separation from the Armed Forces a property right, entitlement denied; and,

As a result of case no. 1, I developed during the process thereof, additional "concealment, conspiracy, deception" by Government official's in the coverup of pertinent documents, relationships that existed at Ft Hood Texas which resulted in the illegal separation thru "SHAM" without "due procedural process" in the denial of access to pertinent records addressed in Sworn Testimony of the former Provost Marshal General, Major General Boatner to the Inspector General--disregarded

without substance or effort to verify the Ft Hood conspiracies, chaos, fiasco, mismanagement of the Command and Generals; which, required him to order the relief and re-assignment of all MP officers assigned Ft Hood. I had been ordered from Ft Hood to overseas assignment prior completion investigation. and due to the circumstances reassigned to Ft Dix as a potential witness in the "Canon" action(s). Requests for access pursuant to "Freedom Information, Privacy, and Sunshine Act(s)" of the Ft Hood IG Investigation(s) of Canon were denied by the Goverment, attached, EXHIBIT to show the connection(s) Ft Hood-Canon-Huntzinger relationships, bias and prejudice of the Inspector General and allegations of witnesses, Command mismanagement as reviewed "BY HEADQUARTERS DEPARTMENT OF THE ARMY". Thereby, as per appeal, this case is not considered res judicata, in that they differ in

substance and rights to overcome statute of limitations were denied, in denial of discovery, deposition, and admissions in case no. 1 which would have overcome the question of statute of limitation by tolling; accordingly, I do not feel this case is frivolous, but presents substantial question of the Soldier's entitlement to due process, pursuant to Government's Regulatory Directives implementing the U.S. code(s), classification of personnel actions not involving the National Security--coverup, fraudulent act(s) concealed by deception and RETALIATORY action for complying with a Senior Commander's request to submit a letter, which was referred to his Staff Inspector General for impartial investigation, complete but before completion the Commander himself was relieved and I was the "TARGET" of my own letter with allegations made by the circumstances described in my letter from official

records, or personal knowledge by those effected without substance on their part or verification of their allegations (by the IG) with denial by declaring NON AVAILABILITY of my requested witnesses without my knowledge since I was assigned at Ft Dix.

Further support that I do not feel this case is "frivolous" is fact that CASE NO. 1--U.S. Cl Ct was based on denial of "due procedural process" by Dept of the Army elements thru illegal, wrongful, and unlawful separation "SHAM" basis recommendation, illegal, of the Ft Hood IG without consideration of my immediate Commander or chain of Command, in RETALIATORY (prohibited by Army Regulation and law) for a letter submitted at the request of a senior commander; without "confirmation" of the allegations against me "extracted" from that letter in violation(s) of Government Regulation, AR 20-1 640-98 and action in violation AR 135-173, 135-215,

Uniform Code of Military Justice and guaranteed rights under the U.S. Constitution, I, IV, V, VII, and VIX Amendments. Further I was not advised of such actions(s) and records were not qualified per AR 640-98 and U.S.C 10 $5706 for consideration by a board. On the last review of additional records granted access to thru FOIA I made discovery that LTC Jack Canon was recommended for "Board" action "AR-15-6" a for-cause action, which was denied me and he was not boarded, and I was eliminated thru the "SHAM" of Annual Screening. The point here is that each time I gain access to another document it confirms that I was used as the Jr Vice President of the Reserve Officer Association as a "diversion" tactic--to save the Commander and LTC Canon. It was further learned that five General Officers were involved at Ft Hood not to note the Chain/Command & Hqs DA--and I still am denied access to all the

records because of privacy of the action officer(s)-staffing-review,--recommendation(s) etc.

CASE No. 2. Based on material evidence developed by case no. 1 regarding impropriety by the Hqs Dept Army, Army Board Correction Military Records (ABCMR) Staff, mal feasence in overseeing functions thereof; denial of my right to pursue by "deposition, discovery, and admissions" by the Ct. and Dept Army to prove the elements of fraud, concealment, and deception, thereby tolling the Statute of Limitations (SOL) in addition development denial due procedural process entitlement by Army-Government Regulations, U.S. Code, and the Constitution--as evidenced by the documents accepted by this Honorable Court, previously denied filing subject Government "documents", substance--supporting my case No. 1, denied solely basis of SOL, without, per Court record, consideration

merits of the case.

I have been denied, to date, under FOIA access to pertinent documents classified by the government as confirmed in attached EXHIBITs, as per letter Aug 29, 1988 that have a relationship to the conspiracies... chaos, fisco, illegal-wrongful act(s) relationships that existed at Ft Hood as attested to in "Sworn Testmony" of Major General Boatner disregarded by the ABCMR/Hqs Dept Army without justification or verification with the IG that took the testimony. Favorable evidence was suppressed--.

In summary, case No. 1 violated written directives contained in Army Regulations, and violated US Statute(s), in addition, denied "due procedural process" guaranteed by the US Constitution and Uniform Code of Military Justice thru illegal, wrongful, and fraudulent separation; and, as provided by law further denial of

Deposition, Discovery, and Admissions of Government fraud, cover-up, concealment by deception with inadmissability of Government documents that verified/ supported in substantial substance the complainant; and, access was denied pursuant FOIA, Privacy, and Sunshine Act request(s), pertinent to show-establish relationships within conspiracy.

Case No. 2. As a direct result of denial case No. 1 to develop improprities coupled with mal feasence of Government officials in not providing supervision of its boards for non-compliance of Regulatory Government Directives "governing" it's policies and compliance with the U.S. Code, as issued orders of the Secretary of the Army--concealed thru deception and denial access to pertinent government documents knowing of the pertinent relationships of documents knowing of the pertinent relationships of documents related to illegal acts; and, upon discovery of

records existence denied access under FOIA, i.e., suppression of evidence.

That Case No. 1 v. Case No. 2 differ in substance, thereby not res judicata and the Government continues to withhold pertinent documents requested FOIA, Privacy, and/or Sunshine Acts thru classification (SECRET) not in the interest of National Defense--but, concealment, coverup of illegal actions taken thru deception. By denial of Discovery, Deposition, and Admission rights the government barred me from proving the illegal, wrongful, fraudulent action(s), that deprived me of my constitutional guaranteed right of procedureal due process in depriving me of my property rights and earned guarantees, violation of government regulatory policies and the US Code; and did not qualify records considered illegally by the Board(s) containing, as determined at Hqs " Dept of the Army Review" to contain bias, prejudice,

foregone conclusion of the Inspector General who is charged to conduct impartial investigations--based there upon recommendation, classified-sequestered, and by "SHAM" thru deception, concealment, and fraudulent acts confirmed within the Documents--accepted by this Honorable Court of Appeals into the record, previously denied. Material fact of law appears to be overlooked in the guaranteed constitutional rights as stated in the complaint and newly discovered by research. There are many cases in conflicts regarding government coverup, fraudulent concealment as recorded in the document submitted "amicus curiae" and recent Court decisions involving Government Contractor(s). The Government has stated "...which cannot be brought again into litigation between the parties upon any ground whatever, ABSENT FRAUD or some other factor invalidating a judgement", (Caps added w/underlining for emphasis)

in civil action 87-1040-A Reply to Plaintiff's Opposition..pg 2. This case was pleaded/and is based in its entirety on Fraud, -concealment, and deception developed further within case No. 1, therefore case No. 2 based on Constitutional Rights and Justice--(subsequent new information).

It is noted the Government has not responded to Appellant's appeal.

In line with the reasoning of the Court below's opinion discussing the General rule of res judicata provides when a court of competent jurisdiction has entered a valid final judgement on the "MERITS OF A CAUSE OF ACTION, THE PARTIES TO THE SUIT ARE THEREAFTER BOUND...." (CAPS FOR EMPHASIS). This case or case number 1, was not considered on the merits of "ILLEGAL, WRONGFUL, OR FRAUDULENT ACTIONS BY DECEPTION, FRAUD, CONCEALMENT OR VIOLATION OF "DUE PROCEDURAL PROCESS GUARANTEED BY THE CONSTITUTION OF THE

UNITED STATES" as adopted and restated in the U.S. Uniform Military Code of Justice for the protection of the Soldier, of his Constitutional Rights-- BY DENIAL OF MY RIGHT TO ADMISSION, DISCOVERY, DEPOSITION involving case No. 1, I was prevented from pursuing my cause of action to "prove fraud", concealment by deception and illegal act(s); and, the Court(s) decision(s) were based on the "UNTIMELY FILED"-- statute of limitations and evidence of "fraud", coverup, concealment, illegal IG Acts by deception and non-compliance with US Code, Government Regulatory policies as law were not pursued, denied the Complaintant, -- as confirmed in government documents accepted by this Honorable Court.

THEREFORE, I respectfully pray that this Court will grant a rehearing basis of the merits, as discovered, and timely filed thereupon on-MERITS of the case, i.e., illegal, wrongful, fraudulent

act(s) by Officials of the United States Government Separation, subsequent promotion(s) without pay--deceit of the Government in their denial of Justice, soldiers guaranteed due procedural rights and his CONSTITUTIONAL RIGHTS and entitlements in accordance with the United States Congress Statutes; and This Honorable Court grant relief prayed for and/or as deemed appropriate.

To this Honorable Court, I do not think that Constitutional violations of the Soldiers Rights are "frivolous" and must be protected by re-establishment of Trust within Government, integrity, by setting the example refining the Doctrine or Fraudulent Concealment by Classification NOT in the National Defense Interests. (The case No. 1 initiated shortly thereafter, pertinent changes within Department of the Army Inspector General System which I think may have been contributed by this case.) This case certainly is personal, but is

also intended to strengthen our Armed Forces Personnel Procedures by the Courts requiring them to adhere to their published Regulatory Directives, Congressional mandated Statutes, and most of all protect the United States Guaranteed Constitutional Rights, the individual is entitled to justice, and the Government must be held responsible for its actions by our elected and appointed officials thru the Judicial System.

Your Honor(s), I thank each of you, and pray that you will take the time to recognize the problem(s) as presented, in good faith, for our children and future of this Country which I love and have been proud to serve; yet, I have been denied my day in Court basis MERITs-SOL v. FRAUD!

Dated: September 2, 1988

Respectfully Submitted:

I.J. HUNTZINGER

****

CERTIFICATE OF SERVICE Sep 2, 1988

****

U.S. COURT OF APPEALS

For the Fourth Circuit

No. 88-3535

IRVIN J. HUNTZINGER Plaintiff-Appellant

v.

JOHN O MARSH, Secretary U.S. ~~Navy~~ Defendant - Appellee

Appeal from the U.S. District Court for the Eastern District of Virginia, at Alexandria. James C. Cacheris, District Judge. (C/A No. 87-1040-A)

Before HALL and WILKINS, Circuit Judges, and BUTZNER, Senior Circuit Judge.

30016

Irvin Huntzinger, Appellant Pro Se.
Paula Mary Potoczak (OFFICE OF THE U.S.ATTORNEY)
for Appellee.

PER CURIAM:

Irvin J. Huntzinger appeals from the district court's order holding his suit to be barred by res judicata.* Our review of the record and the district court's opinion discloses that this appeal is without merit. Accordingly, we affirm on the reasoning of the district court. Huntzinger v. Marsh, C/A No. 87-1040-A (E.D. Va. Mar. 1, 1988). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court and argument would not aid the decisional process.

AFFIRMED

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* In support of his appeal, Huntzinger has moved this Court to accept docments and further, to grant judgment by default and/or summary judgment. We grant the motion to accept documents and deny Huntzinger's other motions.

IN THE U.S. DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IRVIN J. HUNTZINGER	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
JOHN O. MARSH, Secretary	)	No. 87-1040-A
U.S. Army,	)	
Defendant.	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is accordingly ordered:

(1) that the plaintiff's Motion for Amendment to the Complaint is DENIED;

(2) that the defendant's Motion to Dismiss is GRANTED;

(3) that the Clerk shall forward copies of this Order together with the accompanying Memorandum Opinion to all counsel of record.

March 1, 1988 s/s James C. Cacheris

Alexandria, VA U.S. District Judge

IN THE U.S. DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IRVIN J HUNTZINGER	)	
Plaintiff,	)	
v.	)	CIVIL ACTION
JOHN O MARSH, Secretary	)	No. 87-1040-A
U.S. Army,	)	
Defendant.	)	

MEMORANDUM OPINION

This matter is before the court on the defendant's Motion to Dismiss and the plaintiff's Motion for Amendment to the Complaint. The court has considered all the submissions from both parties, and for reasons set forth below, the defendant's Motion to Dismiss is granted, and the plaintiff's Motion for Amendment to the Complaint is denied.

Plaintiff is an Army officer who enlisted in 1946. In January, 1957, plaintiff was discharged from enlisted service to enter active duty as a second lieutenant in the United States Army

Reserve. After receiving several substandard Officer Evaluation Reports (OERs) and other information prejudicial to his "character, standing, or efficiency" in 1958 and 1959, plaintiff was administratively separated from active duty on June 24, 1960.

Plaintiff was allowed to remain in the Army Reserve, and in 1962 he was promoted to the rank of captain. In 1968, he was placed on active duty for 296 days. While on active duty, the plaintiff underwent a complete medical exam which detected a heart condition that made him medically unfit for further active duty. Because of his medical condition, plaintiff was released from active duty, assigned a thirty percent disability rating and placed on Army disability retirement

Plaintiff was dissatisfied with the contents of his military records, and in January 1969, applied to the Army Board for Correction of Military Records

(ABCMR) to have the three OERs removed. His application was denied.

In May, 1985, pursuant to the Tucker Act plaintiff filed suit in the U.S. Claims Court. In Huntzinger v. U.S., 9 Cl. Ct. 90 (1985), aff'd 809 F.2d 787 (Fed.Cir 1986), cert. denied 107 S.Ct. 3267 (1987) reh'g denied 108 S.Ct. 32 (1987), the Claims Court found plaintiff's claims were barred by the statute of limitations and granted summary judgment in favor of the U.S. on October 23, 1985.

Plaintiff has now instituted the present suit challenging his 1960 release from active duty and the actions by the ABCMR. His Complaint seeks reinstatement on active duty with a promotion to the grade of colonel, back pay allowances, punitive damages in the amount of $527,977.00, plus fees and costs.

The defendant claims that the plaintiff's suit is barred by the

doctrine res judicata and requests that this case be dismissed and judgement be entered for the defendant.

Plaintiff also seeks to Amend his complaint and to add another prayer for relief.

The general rule of res judicata provides that when a court of competent jurisdiction has entered a valid final judgment on the merits of a cause of action, the parties to the suit are thereafter bound, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but also as to any other admissible matter which might have been offered for that purpose. A prior adjudication bars a later suit where (1) the first suit concluded in a final judgment on the merits; (2) the second suit involves the assertion of claims by persons who were parties or in privity with parties in the first suit; and (3) the claims asserted in the second suit were based

on the same cause of action as the first suit. Kenny v. Quigg. 820 F.2d 665, 669 (4th Cir. 1987).

In the case at hand, all three of the factors appear to have been met. First, the previous case ended in summary judgment, which is a final judgment on the merits. Second, the privity requirement is met by the fact that the plaintiff sued the government in the prior suit and in this suit. Finally, the plaintiff raises the same factual basis and he asserts the same primary right in this case.

Plaintiff also seeks to amend his complaint to assert a new prayer for relief to include the following: "promotion to colonel, $10,000.00 for the neglectful acts of ABCMR and all costs and attorney fees related to the case." Plaintiff claims that the previous case was based on fraud while this case is based on neglect. Further, the plaintiff argues that the previous

case was barred under the Tucker Act because the statute of limitations had run. In the case at hand, the plaintiff has filed pursuant to the Administrative Procedures Act, claiming that the ABCMR and/or the Army acted in an arbitrary and capricious man-ner in rendering a decision against the plaintiff.

Plaintiff in filing this negligence case should have brought it under the Federal Tort Claims Act, and therefore this court does not have jurisdiction. Further, the plaintiff could have brought the negligence claim in his prior suit.

It appears that res judicata bars plaintiff's claim. Accordingly, the court will enter an appropriate Order.

March 1, 1988 s/s James C. Cacheris

Alexandria, VA U.S. District Judge

IN THE U.S. DISTRICT COURT FOR THE

EASTERN DISTRICT OF VIRGINIA

Alexandria Division

IRVIN J. HUNTZINGER,	)	
Plaintiff	)	
v.	)	CIVIL ACTION
JOHN O MARSH, Secretary	)	NO. 87-1040-A
U.S. Army	)	
Defendant	)	

TRANSMITTAL DOCUMENT

OMITTED FROM THE RECORD

On 30 December 1987 during hearing for "Summary Judgment" by Plaintiff; and, Defendant's Motion to Dismiss--Plaintiff introduced the enclosed document "Office, Secretary of the Army" description of SUPERVISORY CONTROLS and MAJOR DUTIES of the ABCMR Examiner, #5795 establishing responsibilities "for adequacy of factual development... application of procedural and regulatory guidelines, and application of policy consideration."; SUCH POLICIES, dictates responsibities of the Examiner to

"Analyze, evaluate and review evidence, FACTS and legal questions..etc"; and "REVIEWS MATTERS OF LEGAL IMPORTANCE TO HELP FORSTALL ANY INJUSTICE"..."Prepares ...FOR SIGNATORY approval of the Secretary of the Army." (CAPS added); so accepted by DOJ and Court in err.

This document is deemed essential in that it describes the duty, responsibilities of the Board/Examiner limitations in light of justice, supporting Plaintiff's position stated, prejudicial-bias presentation before the Board basis non-producable documents and assumptions not of record confirmed "non-existent" by the Adjutant General and the Executive Secretary, BCMR establishing further irregularity in the processing of this case by ABCMR in endeavorence "protection of its own"; thereby, demonstrating neglect, mal-feasence of office in this case, as stated by the Examiner on 7 June 1983 of illegal, fraudulent and wrongful

separation basis of IG findings and recommendations--such findings and "SHAM" action by the Army Active Duty Board was further concealed, by accomplishment in "SECRET" action, hence concealed within the files of the Inspector General "classified" and SEQUESTERED separate without knowledge of Plaintiff so that he could not become privy by virtue of classification under Uniform Code of Military Justice and U.S.C., exempt from FOIA, Frivacy Act(s)--such inquiry, had he suspected--conspiracy--within the highest level of the Army to illegally separate him by termination of his Active Duty Contract allleging "OERs" as confirmed in responses to Congressional inquires, without any reference to "for cause" or disciplinary action, this information, privy of the ABCMR, had specific responsiblity of the ABCMR to be acted upon in light of justice, not permitted or tolerated, by not doing is act of

"neglect" and reflects upon the supervisory controls established in the attached documents responsibility ABCMR Examiner--per record without approval Secretary of the Army and when discovered brought to the Secretary's attention went without action thereby condoning impropriety act(s) by the Board (records not properly before it in accordance with 10 U.S.C. Sec 5706) established by the US Congress to prevent such actions, granting authority to waiver statute of limitations (not applicable in this case, timely filed) in light of JUSTICE, the responsibility of Secretary Army thru civilian ABCMR.

DATED: February 12, 1988

BY: I.J. HUNTZINGER

Pro Se

CERTIFICATE OF SERVICE

I certify copy this document deposited in the US mail, addressed to Counsel of Record, prepaid 1st class, 13 FEB 1988

I.J. HUNTZINGER

Department of the Army
JOB DESCRIPTION

1. Job Number # 5795
2. Office, Sec. of the Army
3. Organ. Loc.: DA Military Review Boards
Agency, Bd for Correction of Military
Records, Examining Branch
4. Citation: USCSC Series def. GS-950, 9/75; GS-205, 6/71 C/W USCSC PCS GS-905, 10/59; GS-201, 6/66 new position FLSA/EXEMPT

****

13. SUPERVISORY CONTROLS. Works under the general supervision of the Chief, Examining Branch and the Section Chief who provide advice and assistance on problems and policy matters. Work is performed independently with controversial and highly involved technical issues brought to the attention of the supervisor. Completed assignments are reviewed for adequacy of factual development; soundness of judgment; application of procedural and regulatory guidelines, and application of policy considerations.

MAJOR DUTIES

Analyzes, evaluates and reviews evidence, facts and legal questions in connection with cases brought before the Army Board for Correction of Military Records. Answers legal questions presented based on research of laws and legal authorities. Determines disposition of formal applications and adjudicates requests for reconsideration of cases. Acts as the Board's authorized agent in negotiations with applicants and their attorneys.

The ABCMR is the highest echelon of appeal within Department of Army for

correction of military records and the payment of money resulting therefrom. Applications are received from military personnel, enlisted and officer, including Army Reserve, National Guard and the Regular Army, their heirs or legal representatives. The issues embrace every conceivable phase of the administrative, medical and judicial operation of the Army, as applied to all persons who are, or have been subject to Article II, Uniform Code of Military Justice. Thus inherent are the delimeation, application and interpretation of legal aspects of corresponding diversity and antecedence, as well as the judicious consideration of all points of equity involved, and the opinions of staff members from the Office of the Judge Advocate General or the Surgeon General. Applies a high degree of professionalism, and a thorough knowledge of laws governing military personnel; the Uniform Code of Military Justice and of military personnel rules, regulations and precedent legal, medical and administrative matters. Representative types of the most complex or most difficult cases examined and completed are as follows:

General Court-Martial Appeals
Removals of derogatory efficiency report (Officer and Enlisted
Officer Promotion Appeals
Survivor Benefit Plan Cases
Archival Cases
Appeals of Reduction-In-Force and reinstatement on active duty (Officer and Enlisted)
Reserve retirement (10 USC 1331)
Disability retirement; percentage of disability-service aggravation of EPTS disability 50 + O/O

1. Analyzes, evaluates and reviews evidence, facts and legal questions in

connection with (1) examination and review of appeals of court martial convictions challenging the legality of the proceedings, (2) evaluation of legal briefs of applicant/counsel and supporting evidence and (3) review of plaintiff's petition in litigation cases. Answers legal questions, where they have been settled by interpretations of applicable legal provisions, regulations, precedents and agency policy, in order to expedite preparation of Board decisions.

2. Reviews formal applications, satisfies all jurisdictional and procedural requirements and determines adequacy of supporting material. Based on a thorough and comprehensive examination and analysis of the application and related data, determines (1) if applicable statutes, laws, regulations, procedures and policies have been properly interpreted and applied and (2) the disposition of application through recommendations to the ABCMR, such as denial without hearing; relief in whole or in part without formal hearings; or relief in whole or in part with formal hearings including advising on the potential adverse impact or undesired effect in granting an applicant's request for reliefor correction of records. Attends and participates in formal hearings, as well as executive sessions afterwards, insuring the due consideration of all appropriate factors. Reviews matters of legal importance to help forestall any injustice, weakness or oversight which might result in criticism, rehearing or further judicial proceedings. Prepares final or formal proceeding reflecting adjudication with or without formal hearings for signatory approval of the Board containing factual findings and conclusions and directives for the

signature of the Secretary of the Army.

3. Adjudicates, with authority for finality of action, requests for reconsideration of cases closed by denial of a formal hearing, on the basis of pertinent laws, regulations, policies and precedent decisions. Provides the reasoning upon which the Secretary may direct rehearing or withdraw prior action and substitute therefor a directive granting all or a portion of the relief requested. On denials without a formal hearing, where the pleadings and evidence submitted appear to warrant reversal of action, recommends that the case be reopened and a formal hearing granted, or that relief be granted without formal review.

4. Reviews general court-martial cases to determine possibility of legal error or substantial injustice and recommends proposed action based on such determinations as whether (1) other legal remedies have been exhausted, (2) court had jurisdiction of person or offense charged, (3) applicant was accorded due process of law and, (4) competent tribunals gave fair and full consideration to all procedural safeguards deemed essential. Prepares a comprehensive summary of the pertinent facts incorporating therein any legal interpretations researched, equitable aspects involved, and any previous legal citations, precedents, and Department of Army policy which may be applicable.

5. As an authorized agent of the Board, negotiates with attorneys and/or applicants in matters pertaining to allegations of error or injustice and the nature and quality of relief requested. Confers with these individuals prior to any Board action with a view to narrowing or clarifying

the issues involved, stipulating the facts, and defending the Department's position. Negotiates to arrive at judgments acceptable to both parties so that lengthy proceedings may be obviated without jeopardizing the interest of a vital principle or position of the Government, or the right or equities residing with the applicant. Negotiates the withdrawal of an application without prejudice to the merits, based upon such factors as inadequacy of application, possible resolution of issue or principles by pending legislation or judicial action, and/or other administrative method of relief. Negotiates with applicants and attorneys to effect a satisfactory solution to matters referred by Department of Justice and JAG, wherein the Department is a Defendant, on cases pending before the US Court of Claims. Is responsible for obtaining the best possible agreement consistent with facts, insuring substantial justice for the plaintiff and defendant. Incumbent represents the Secretary of the Army when discussing cases with applicants counsel and members of congress. When cases proceed to litigation, performs case preparation tasks, including the collection, analysis and evaluation of evidence.

Performs other duties as assigned.

NOTE: Incumbent will have access to classified information.

MEMO: Added underlining for emphasis of requirement for Secretary Board and Secretary Army signatory authority

INSPECTOR GENERAL REGULATION
AR 20-1

*****

1-30. Release, use and amendment of IG records and reports and other records and reports

a. General. All IG records, (including USAR IG records and ARNG IG records concerning federally-related matters) are the property of the Secretary of the Army and are maintained on the Secretary of the Army's behalf by TIG. No one but TIOB, the CSA, and the Secretary of the Army can release IG documents outside DA. The procedures described in this paragraph concern the release, use and amendment of IG records, as defined in the glossary. Procedures outlined at b. below address official uses of IG records within the DA. Procedures outlined at c. below address requests under the FOIA (sec 552, title 5, U.S.Code as amended (AR 340-17) and the PA (sec 552a, title 5, U.S. Code) (AR 340-21) Procedures outlined at d. below address all other requests for IG records including those from the DOD IG and the GAO.

(1) IG records may contain as exhibits documents which were not prepared by IGs or do not come under the responsibility of TIB. Requests fro such documents will be forwarded to HQDA(DAIG-ZXR). WASH DC 20310-1718 for processing)

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(3) Officials authorized to use records or information covered by this regulation must be particularly sensitive to the need for protecting the identify of witnesses who request confidentiality. Any breach of confidentiality will materially weaken the IG System and adversely compromise witnesses.

b. Uses within DA by the directing

authority. Subject to provision stipulated, applicable portions of IG records and reports may be provided to individuals, commands or agencies within DA with a need for these records in the official performance of their duties. The use or attachment of these records exhibits to records of other offices or agencies within DA is not authorized without the written approval of TIG. Recipients will be informed of this restriction in writing and that the record is to be destroyed or returned to the originating office when it has served its purpose. UNAUTHORIZED REPRODUCTION OR RETENTION OF IG DOCUMENTS IS STRICTLY PROHIBITED. Written notification concerning the release and its jusitification will be retained with the record file copy of the folder.

(1) IG records will not be used as the basis for adverse action against individuals by directing authorities or commanders except when specifically authorized by TIG, the VCSA, or the CSA.

(2) When an IG record is used as the basis for action, the individual concerned will become entitled to additional due process rights that will breach the confidentiality of witnesses and IGs. When an IG record is used, the minimum amount of evidence necessary from the record will be used. The use of such record must be coordinated with HQDA(DAIG-ZXR) before initiation of the action. Assistance in determining if an action is deemed adverse may be obtained from the Office of TIG(OTIG) legal advisor at HQDA(DAIG-ZXL).

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(5) IG records will not be made available to individuals or their counsel to be used in administrative and military justice actions or the appeal of efficiency reports as an official use

within DA. Such records will be made available, through HQDA(DAIG-ZXR), to review and appeal boards for their consideration. Individual requests will be processed under para. 1-30c or d as appropriate.

c. FOIA and Privacy Act request. TIG is designated Initial Denial Authority (IDA) under the FOIA, and Access and Amendment Refusal Authority (AARA) under the Privacy Act for the records identified at a. above.

*****

"EXTRACT"

§151. Privileged and Nonprivileged Communications

******

Para 151 c.

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(3) Confidential and secret evidence. The Inspectors General of the various armed forces, and their assistants, are confidential agents of the military or executive departments concerned or of the military commander of whose staff they may be serving. Their investigations are privileged unless a different procedure is prescribed by the authority ordering the investigation. Reports of these investigations and their accompanying testimony and exhibits are likewise privileged and copies thereof need not be furnished to any person other than the authority ordering the investigation or superior authority. However, when application is made to the

authority ordering the investigation for permission to examine for use, or to use, in a trial by court-martial or other military course of justice certain testimony, or an exhibit, accompanying the report of investigation, which testimony or exhibit may become material in the trial or course of justice, for example, to show an inconsistent statement of a witness, he should approve the application unless he is of the opinion that it would be contrary to public policy to divulge the information desired.

*****

IN THE UNITED STATES CLAIM COURT

May 28, 1985

IRVIN JAMES HUNTZINGER)	Off. of Clerk
Plaintiff)	US Claims Court
v.)	
THE UNITED STATES,)	No. 317-85-C
Defendant)	

COMPLAINT

NOW COMES the Plaintiff, IRVIN JAMES HUNTZINGER, acting as his own attorney, pro se, of Counsel, and respectfully represents unto this Honorable Court as follows:

1. That this Court has jurisdiction over this cause under Title 28, United States Code, Section 1491, the reinstatement on active duty in the Army of the United States, in grade of First Lieutenant with date of rank as of 15th day of July 1958, effective 24 June 1960, and constructive promotion to the grade of Colonel (06), with date of rank effective 3 July 1981; and, to recover

08639

back pay, allowances, accumulated benefits, and entitlements since 24 June 1960, the effective date of illegal separation from active duty in the United States Army;

2. That the Plaintiff is a citizen of the United States and a resident of the Commonwealth of Virginia;

3. That he is a career serviceman who is in a retired status of Major, Army of the United States, with the pay grade of Captain (O3E) - with 30% disability.

4. That on 24 June 1960, after service 13 years 8 months 20 days, of which, most recent service was commissioned status - 3 years 4 months 29 days; Plaintiff was illegally relieved from active duty by the United States, Department of the Army (DA), Active Duty Board (ADB), allegedly by an annual screening process, provided under provisions AR 135-173 (Exhibit "A") and AR 135-215 (Exhibit "B");

5. That Plaintiff's relief on 24 June 1960 was a result by being a victim of retaliation for submission of a letter dated 24 January 1959, and in compliance with, at request of the Deputy Post Commander, his Senior Superior Officer, for the Commanding General Fort Hood, detailing his observations during assignment 720th Military Police Battalion, Fort Hood, Texas, specifically as pertained to the Military Police Activity, his duties, and relationship, between the Military Police Battalion and the Post Provost Marshal Office where he performed his Military Police Duty, and was illegal and improper for the following reasons:

a. An Inspector General Report of Investigation of the improprieties at Fort Hood, Texas was improperly utilized by the Army Active Duty Board (AADB) in relieving Plaintiff from active duty in that it was conducted by a prejudiced Investigating Officer, not conducted in

accordance with Army Regulations, and furnished to the AADB in violation of existing Army Regulations, all of which denied Plaintiff military due process.

b. Recommendations for Relief from active duty were made by the Office of the Provost Marshal General in violation of Army Regulation.

c. The Office of the Provost Marshal General failed to furnish the AADB with Plaintiff's efficiency reports and recommendations for continuation on active duty from the Command at Fort Dix, NJ., in violation of Army Regulation.

d. Plaintiff was never informed by the Department of the Army that his records were being reviewed by the AADB for elimination for the purpose of submitting rebuttal information which is in violation of Army Regulation and Military due process.

e. That the Officer Efficiency Reports, during the period 27 March 1958

and 26 January 1959 (268 duty days and 37 other) a 9 month rating period, should be voided and not considered by the AADB, were made by--prejudiced Rating(s) and Indorsing Officer; and further the Efficiency Report for the period 28 September 1959 - 30 November 1959 (Exhibit "C") was incorrect as the favorable comments from the Indorsing Officer were improperly eliminated from this report thereby prejudicing the Plaintiff. Copy original Efficiency Report attached (Exhibit "D"), pertinent, fact, Indorsing Officer evaluated Plaintiff "Superior" performance - promotion potential, and a "Superior Officer of great value to the service." The Indorsing Officer had daily and/or frequent observation from date that Plaintiff was assigned 716th Military Police Battalion on 27 January 1959 thru date completed Efficiency Report 23 December 1959, a 12 month period, in his position as Battalion

Executive Officer, Provost Marshal, Commander (Battalion), and direct supervisor of Plaintiff during assignment Fort Drum as Assistant Provost Marshal. During this period Plaintiff received Commendation from Commander, Fort Drum not forwarded by Unit, "A" Company Commander whom rated Plaintiff improperly while serving as Assistant Provost Marshal without consultation or reference thereto. (See Exhibit "E").

6. The Plaintiff made application to the ABCMR for relief on the following dates: 19 March 1960, 13 September 1968, 9 September 1969, 12 November 1970, 5 May 1971, 30 July 1979, 11 December 1981, 24 March 1983 with drawn 7JUN83, by agreement Plaintiff-ABCMR WITHOUT PREJUDICE to be resubmitted, -- resubmitted revised 24 March application, 9 September 1983;

7. These applications were improperly denied by the ABCMR as the decisions

were against the weight of the evidence, arbitrary and capricious and contrary to Statute;

8. The action taken by the United States Army relieving Plaintiff from active duty was not in accordance with Army Regulations, Instruction to the AADB from Secretary of the Army relating to the authority and policy governing the AADB; and, further was merely a "SHAM" to void "formal elimination action" against Plaintiff wherein Plaintiff would be entitled to a hearing; and, allowed to present evidence in his behalf; examine witnesses, testimony, evidence and accorded other military due process to which he was entitled, to include appointed Counsel by an Attorney, before being discharged from his position as a "Professional Military Soldier."

9. That Plaintiff is entitled to recover back pay, allowances, and other benefits in the amount equal to those of

his contemporaries, by reinstatement-constructive promotion to the grade of Colonel from the date of his invalid discharge on 24 June 1960, until his retirement, less the retired pay, active duty and USAR.

10. That Plaintiff is entitled to recover his attorney's fee for counsel, cost and expenses connected with correction of his wrongful discharge on 24 June 1960 and with his efforts to correct subsequent errors and injustices which resulted from his initial wrongful relief from active duty.

11. That no action has been taken by Congress or any Department other then as set forth above and that Plaintiff is the sole owner of said claim, and that no part has ever been assigned or transferred; and that Plaintiff has exhausted all of his administrative remedies with the Army for Correction of Military Record, to best of his knowledge;

12. The claim herein is based upon the following, among other, provisions of statute:

> 10 U.S.C.A. 1552, authorizing the establishment of correction boards by the Secretary of the Armed Forces concerned to correct errors in military records of, or remove injustices to military personnel."

13. The Plaintiff now prays that this Honorable Court will correct the record, by setting aside Efficiency Reports for the period 27 March 1958 thru 26 January 1959 (pertinent, a 9 month period vs. 165 months); by further correct the record to reflect that Plaintiff had never been relieved from active duty, restoring him to active duty as of illegal date of separation 24 June 1960, grant constructive promotion to rank from effective date 3 July 1981 grade of Colonel, and granted back pay, allowances authorized in the amount of

$647,977.33 (Base Pay, Quarters and Subsistance allowances); and benefits, entitlements, allowances authorized in addition thereto. Recognized is off-set, by regulation, then in effect.

14. That Plaintiff's disability retirement be set aside; and, as recommended by Plaintiff's Physical Evaluation Board 6 October 1969, that he be continued on active duty; disapproved by Department of the Army with basis stated "chest pain of undetermined etiology"; appealed by appointed military counsel, subsequently rated 30% disability when coupled with prior medical service record-separation physical 24 June 1960; combined creditable service 23 years 11 months 27 days, Active - 16 years.

WHEREFORE, Plaintiff prays judgement as follows:

1. Recovery of $647,977.33 back pay, allowances, and other benefits in the stated constructive promotion; from his invalid discharge date on 24 June 1960,

less mandatory offsets; and,

2. That his disability retirement of 1 October 1970 be set aside; and, Plaintiff continued on active duty, without separation or retirement; and

3. Recovery of Attorney's fee, costs, interest and expenses connected with the correction of error and injustices relative to his wrongful discharge on 24 June 1960, disability retirement on 1 October 1970 with transfer to Retired United States Army Reserve, and to subsequent error and injustices; and,

4. For such other relief as the Court deems proper, and/or punitive damages as the Court deems appropriate; and, proper for 25 years mental anguish, character assassination, and --.

DATED: 28 May 1985

By:

IRVIN JAMES HUNTZINGER, Plaintiff
Major, United States Army, Retired
18 Tree Haven Lane
STAFFORD, VA 22554-9251
(703) 752-7562

IN THE UNITED STATES CLAIMS COURT

FILED

IRVIN JAMES HUNTZINGER) MAY 29 1985

Plaintiff) US CLAIMS CT.

v.)

THE UNITED STATES,)

Defendant)

COMPLAINT

(AMENDMENT)

NOW COMES the Plaintiff, IRVIN JAMES HUNTZINGER, acting as his own attorney, pro se, requesting Plaintiff's complaint be amended as follows:

ADD

Par 5b. end of paragragh add "as follows:"

(1) That Plaintiff's elimination from active duty was caused by recommendation of the Provost Marshal General dated 15 FEB 1960; which, contained wrongful and fraudulent material information; and, action based on the Inspector General's report of investigation, which was prejudiced and biased.

(2) The Provost Marshal General recommendation of elimination action was withheld from Plaintiff; as, was the Inspector General Report, discovery made 13 June 1979, in part, through research pursuant Freedom Information Act.

ADD

Para 15. Statute of limitations is recognized, however, Department of the Army deliberately withheld fraudulent information, biased investigative report furnished the AADB - which was used to wrongfully eliminate Plaintiff; and, upon discovery Plaintiff filed such evidence with ABCMR on 12 Nov 1979, in pursuit of his administrative remedies concerning his relief from active duty, set aside biased ERs, and reason disapproval recommendation promotion to Major, USAR by two General Officers, denied, and denail continued service as a precedent for USAR Officer on AD-Army of the United States.

ADD.

16. On 2 May 1969, Major General Hayden L. Boatner, former Provost Marshal General making recommendation of elimination action, originally, discovered that Plaintiff was relieved from Active Duty, and denied continuance submitted "sworn testimony" thru the Inspector General of the Army describing the on-going activity at Fort Hood, which concerned Plaintiff, elaborating on the conditions at Fort Hood as "chaos"...etc., fact that the Senior Military Police Officer, the Post Provost Marshal was confined in his own stockade, subsequently court martialed by a General Court - "acquited", and further described the turmoil, conspiracies, and recommended that the 9 month rating period of Plaintiff be set aside at Fort Hood; submitted ABCMR, denied.

17. That statute of limitations is tolled by virtue of Plaintiff's continued pursuit of administrative

remedies directed by agencies of the Department of Army and ABCMR. On 6 January 1983 Plaintiff was notified by DA, Office of the Assistant Secretary, ABCMR, Executive Secretary, per letter, (Exhibit "F") that he had exhausted his appeal within the DA, and referred him to this Honorable Court. On recommendation TAGO and TIGO, DA Plaintiff was advised to submit new application, subsequently denied on 27 FEB 1985.

DATED: 28 MAY 1985

BY:

IRVIN JAMES HUNTZINGER

*****

CERTIFICATE OF SERVICE

29 May 1985

*****

IN THE UNITED STATES CLAIM COURT

AUG 30 1985

IRVIN JAMES HUNTZINGER	)	
	)	
v.	)	No. 317-85C
	)	
THE UNITED STATES	)	

ORDER

Plaintiff's Motion For Leave to File One Copy Deposition & Discovery is denied without prejudice. Plaintiff may renew this motion, if it so desires, after the Court's decision on the Defendant's Motion To Dismiss, Or In The Alternative, Defendant's Motion for Summary Judgment (assuming the lawsuit survives the defendant's motion).

IT IS SO ORDERED.

s/s Robert J. Yock

Judge

00054

IN THE UNITED STATES DISTRICT COURT

FOR THE

EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

IRVIN J. HUNTZINGER)
18 Tree Haven Lane)
Stafford, VA 22554-6406)
Plaintiff,)

v.) CIVIL NO.: 87-1040A

The Hon. John O. Marsh)
Sec., U.S. Army; and)
HQs, Dept of the Army,)
et. al)
Pentagon)
Arlington, VA)
Defendant,)

I

C O M P L A I N T

1. a. Plaintiff is suing in this action for negligent conduct by "government official(s): of Headquarters Department of the Army (DA) in the "secret", illegal, wrongful and fraudulent revoke(ation) of Plaintiff"s "active duty" (AD), "indefinite service agreement", Exhibit "A:, concealed within classified "SEQUESTERED" Inspector General (IG) records Army United States (AUS), as a United States

Army Reserve (USAR) officer, thru "SHAM" -- of "annual screening" -- by the DA, Active Duty Board (ADB) per Board action, CMT.4 to MPC Br dtd 7 Jun 1960, Exhibit "B:, based on "illegal" recommendations of the PMG, CMT 3 to the ADB, ("WITHOUT" the knowledge of Plaintiff that separation was "FOR CAUSE"--thereby action was deceptive, Plaintiff did not know of his illegal separation, due procedural process entitlement because of deception) Exhibit "B:, violates C4, AR 135-173, par 50, Exhibit "C", confirming Secretary Army instruction of 13 May 1960--to President of the ADB, Exhibit "D", basis recommendations "for cause" previous command IG, Ft Hood; without plaintiff's knowledge, as forwarded to the Board by Officer of the Inspector General (OTIG), illegally, per CMT 1, Exhibit "E", further violation Secretary Army Order 13 May 60 as confirmed in C4, AR 135-173 and Federal Statute, USCA 10

Sec 5706. See Extract Biddle v. US (1968), Exhibit "D"); letter elimination notification, HQs DA-TAGO, 2 Mar 60; Subject: Relief from AD--AGPO--SC Huntzinger, Irvin J. 01923750 dtd 2 Mar 1960, appealed per letter 19 Mar 1960, "Not forwarded DA-ADB"; ADB sustained original "Relief from AD" per CMT4 (Exhibit "B") par 5 IG CMT 1 (Exhibit "E") without benefit of most recent eighteen months (versus Ft Hood nine months) service with immediate Commander(s), staff, Provost Marshal, supervisor(s) recommendation and/or benefits of current efficiency reports - commendation(s), placement "TOP 10%" contemporaries.

b. IG investigation was initiated based on a letter requested by the Commander (Deputy) of plaintiff's observations, knowledge of M.P. activity, Ft. Hood, referred by Commander to IG directing investigation without plaintiff's knowledge, after my

"departure on reassignment" orders.

c. For cause, classified records were discovered at GSA Archives through FOIA - Privacy Act(s) fishing expedition(s) in HQs DA retired "sequestered" IG records.

d. Jury is requested.

II

STATEMENT OF JURISDICTION

2. Constitutional, Government Federal Statutes and Army Regulation directives:

a. Constitution of the US:

Violation of I, IV, V, VII, VIII, XIV Amendents; and Amendment 5, Art Vii, UCMJ; and

b. Federal statutes:

(1) 2 USC 60 stat. 831; 190g Sec 131 of the Legislation Reorganization Act of 1946; and

(2) 5 USC; sec 701 (b) (1) (f) 5-52(b) (6) & (7), exempt from mandatory release "IG records." 5-52(b) (5) (6) (7) exempt "FOIA & Privacy Act IG Records" sec 8552(1982); and

(3) 10 USC Sec: 632 (1980), 938, 1552, 5706 UCMJ Art 138, 139; and

(4) 28 USC Sec 75, 1254 (a) (2), 1331, 1351, 1491, 2401, and 2501 (1982) stat. of limit., and

(5) Federal Torts Claims Act, and

(6) Tucker Act USC 2, 1346 (a) (2) (1982); and

(7) White Charger Act of 125-2 1960, stat 386, 395; and

(8) Army Regulations (AR) 15-6, 15-185, 20-1, 135-173, 135-215, 140-175, 600-31, 640-5, 623-105, 640-98, *HQ DA IB TB 2 & 4; and

(9) Secretary Army Letter Instructions to President DA-ADB, dtd 13 May 1960, as re-stated in C4, AR 135-173; and

(10) U.S. Armed Forces Manual for Court Martial, 1951; and

(11) UCMJ; and

(12) Judical Review of Constitutional Claims against the

Military, 84 Col. L. Nev 38) (March 1984); and

(13) Stat of Limit., 63 Harv. L. Review 1177, 1221, (1950); and

(14) Rule 11, Fed R. Cir P; and

(15) Moore's Federal Practice; 56.12, 56.15(5), and 56-15 (1.00).

III

DISCUSSION OF GRIEVANCES

3. Per AR 135-215 para. 10C "records of Reserve Officers on AD will be screened annually at the DA..." Exhibit "F", and further states in para. "(1) Records will be screened at the DA to insure uniform maintenance of standards, etc. complaince with "annual announced screening" instructions. In accordance with AR 135-173 Sec XV "Annual Screening of REcords" *** "will be screened annually at HQs DA"..., Exhibit "G"; and, C4 AR 135-173 para. 1.e Exhibit "H" provides that "all information considered *** by boards *** must qualify *** under provisions of AR 640-

98; and, pursuant to C4 AR 135-173 para 50 (Exhibit "G") *** "will forward, without recommendations to DA-ADB *** to be considered within annual prescribed guidance and criteria; and, C4, AR 135-173, para 51, Exhibit "I", Prior to forwarding such a recommendation *** refer for comments or rebuttal to officer ** (See AR 640-98)." Refer USC 10 Sec 5706.

4. In accordance with TB-IG 4, Exhibit J, 16 Jul 1958, (Extract) para 16, the IG has a responsibility to advise the individual "informing persons of Prejudicial Matter".... Courts attention is invited to news interview of Colonel McKnight, IG, Exhibit K, "role of the IG and complaints" *** any type of disciplinary action or adverse type action taken *** for registering a complaint *** is prohibited by Army Regulation." This policy is of record within the IG Records, SOP, GSA Archives dtd in 1957 and amendments thereafter, reviewed during period 31 Aug 1984 - 86

by Plaintiff. Review confirmed illegal, wrongful, and fraudulent actions.

5. Reports of IG Investigation are by law "privileged", classified per UCMJ para 21, Exhibit L; also see update AR 20-1 (Exhibit "L") re-stating confirmation of DA-TIGO SOP policy, of records in the Archives; and "Rules of Evidence" Extract USMJ, Exhibit M, para 151. Privileged and non-privileged communication; and, re-confirmation of DA-TIG policy, per memo for Archivist dtd 10 May 1983, Subject: IG Records, Exhibit "N" -- "without concern for public disclosure" para 3-200, AR 340-17; and IG reports are exempt FOIA and Privacy Act(s) by law (USC) and regulation.

6. Reference BCMR, DA letter of 22 Jul 1985 response to FOIA/Privacy requests for "NON-EXISTENT"---records cited by Examiner BCMR, confirms, quoted records referred to with its BCMR decision, signed by Acting Secretary, Exhibit O, "failed to find the documents

you are seeking."; and DA-TAGO, USARCP & AC ltr of Jun 3, 1986 confirms "none of these documents are a matter of record.", Exhibit P.

IV

STATEMENT OF FACT-SUMMARY

7. Records before the Board, illegally, were in violation of Government regulations, Federal statutes, that which requires records must be before the Board properly, verified, and consideration of adverse information must be qualified, AR 135-173, AR 640-98 -- refer USCA 10 SEC 5706-UCMJ. Also "Government" will refer to federal officals, fraudulently concealed federal actions against parties may be tolled according to traditional tolling principles under the Supreme Court holding in Holbery, 327 US at 397; and Allen v. U.S. 588F. Supp 247 in which the statute of limitations was tolled because Government concealment prevented discovery of the inquiry as a result of

government; that documents were "sequestered - concealed" by law.

8. The DA ADB action was "illegal" in violation of: ARs federal statues, and "procedural due process" under Constitution of the United States, specific instruction issued by Secretary Army to President, ADB per ltr 13 May 1960; and, Plaintiff pleas "Deception, Fraud, Concealment by cover-up."

9. The BCMR acted arbitrary and capriciously in denial of hearing, by misrepresentation of alleged fabricated facts verified by DA as "non existent"--and basis of JAG opinion, without foundation/formulation, "untimely filed"; without "verification" of the merits and facts required by AR 15-185 and USCA 10 Sec 1552 "to correct an error or remove an injustice..." "Waiver" alleged "untimely filed" may excuse "in the interest of justice". Exhibit Q.

WHEREFORE, Plaintiff requests reinstatment on active duty, USAR-AUS, with

constructive promotion to grade of Colonel (equiv. last assignment ordered AD-AUS 8 Sep 1968 w/USAR pos "Sr. Advisor" Logistical Support Commander (Colonel); and/or, 2 grades (i.e. Colonel) as authorized promotion by Army policy, SOP of BCMR for injustice as punitive damages) with back pay, allowances, etc., judgment amount of $527,977.00 plus pending cost claims basis of contingencies obligated for: counsel, consultation, legal fees, administrative costs (typing, printing, etc.), with interest thereon at the legal rate from date of judgment until paid and costs in these entire proceeding(s); and/or, such relief as this Honorable Court deems appropriate in light of fairness and justice.

Dated: October 15, 1987

By:

Irvin J. Huntzinger, pro se
18 Tree Haven Lane
Stafford, VA 22554-6406
(703) 752-1060

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

88-3535 Huntzinger v. Marsh
CA-87-1040-A

INFORMAL BRIEF

1. Did the district court fail to consider important grounds for relief. If so, what grounds?

1) That the current case pending before this Court is for "neglect" of the Honorable John O. Marsh, Jr., Secretary of the Army in the administration/supervision of his duly appointed (civilian) Board Correction of Military Records (ABCMR); and

2) That the case of Huntzinger v. the U.S., 9 Ct. Cl. 90 (1985) was for the Army's illegal, wrongful, and fraudulent separation act(s) concealed by the Army IG/Hq Dept Army; and, during defendant's court presentation, it became evident that the "ABCMR" is part of that cover-

up, concealment. But Huntzinger was denied his right of "deposition, discovery, and admissions"; and had to "suspend" his FOIA, privacy act(s) requests for access to "classified" IG-ROI on motion of the U.S.; and specific denied (ABCMR had access) review of the IG-ROI of Ft. Hood and "MP Activity" which per "sworn testimony" of Maj Gen Boatner, he relieved/reassigned: "All MP officers"; and the Commanding General (MG Biddle) and Deputy were also relieved. Huntzinger had requested these individuals as witnesses, however, the new Commander declared them "not available", but Huntzinger was not advised." See exhibit "A", Memo of Consideration, ABCMR, Feb 27, 1985, with attached miscellaneous documents pertinent, Case No. 1; and, Exhibit "B", "C", and "D" Case No. 1, Pleadings/Brief(s).

2. Did the district court incorrectly decide the facts? If so, what facts?

In err the Court was not aware of the complete facts; and based opinion that it appears on motion of Army "Res Judicata"..had the Court all information, I believe the Court's opinion would have been different. In essence, it only had case No. 1 and the "end" result as before the ABCMR are the same, though the case(s) are different: 1) discovered upon completion of litigation case no. 1, it is evident that the "ABCMR" was "neglectful" in their responsibilities by NOT "verifying" the records they cited, depended upon for their denial of Huntzinger's application(s) assuring that they were properly "qualified" in accordance with 10 USC $5706/AR 640-98 before taking action by selection board(s); i.e., separation

promotion, active duty, etc. That the soldier has every "right" to expect his leaders to do the proper thing provided within their regulatory guidelines and depend on the Inspector General to be impartial, fair, and not participate in unethical "secret" activities; and the ABCMR is stablished for the purpose of "resolving" injustice(s) by the U.S. Congress with dependence on our elected/appointed government officials. We must restore that faith through our Court(s) as presented in Mr. Shapiro's Yale editorial, submitted as "Amicus Curia" to show the various Court opinions, cites and pertinent facts "Citizen Trust and Government Cover-up: Refining the Doctrine of Fraudulent Concealment" with appeal. Exhibit "E".

3. Do you think the district court applied the wrong law? If so, what law do you want applied?

Justice. "Due Procedural Process" recognizing that Case 1 and 2 are distinctly separate litigations; the 2nd case developed as a result of the 1st case in Huntzinger v. U.S. 9 Ct. Cl. 90 (1985), which could not be developed prior or during litigation because on motion of US the court ordered discontinue "deposition, discovery, and admission(s) to pursue faults of the board(s) action(s) and FOIA inquiries within HQ DA. See enclosed motion to admit a copy of these requests with letter explanation of denial. The court must require the government to comply with its regulation(s) i.e., AR 15-6, 15-185, 20-1, 640-98 and USC 10 $1552, 5706; and "due procedural" process granted by the

U.S. Constitution I, IV, V, VII, VIII and XIV Amendments and the U.S. Code of Military Justice.

4. Do you feel that there are any other reasons why the District Court's judgment was wrong? If so, what?

The court's decision seems to treat as a single incident, what happened in 1958, and all the events that occurred since that time. In fact, this has been simply a series of discoveries made by Huntzinger in spite of the efforts of the military to continue the concealment and tort fraud because of the embarrassment that a factual resolution might have on the military that leaves--one area which is...the discovery of wrong doing, let's say, of the regulatory breaches at the ABCMR/HQ DA is simply the latest "discovery" and one which was not apparent until

after the appeal process was finished, until after the Claims Court proceeding had been over. This becomes a subtle point. Because the Cl. Ct. decided the case on the basis of summary judgment, denial of motion for discovery, which might have lead to learning of the errors during the course of that proceeding. Please refer to enclosed motion "introduction of court records" consideration of justice.

5. What action do you want the Court to take in this case?

Set aside the District Court opinion of Res Judicata and, render a decision based on the "merits" basis of qualified government (Army) records obtained through the 1975 FOIA/Privacy Act(s) not available to the military in 1960 and we placed our faith in the Army to do the

proper thing. That the Government must comply with its regulatory directives and in "good faith" relies that the military, fair assumption, complies, thereto.

6. If you think the Court should hear oral argument in this case, why do you think so?

No. See attached brief dated 21 April 1988. Oral argument decision we leave to the court to answer any question(s) it may have; and, appellant relies primarily on government records and "Amicus Curiae" submitted to this Honorable Court, for pertinent facts and cites of law.

Brief Discussion of Facts

1. This case is based on the neglect on the part of the Honorable John O. Marsh,

Jr., Secretary of the Army and Hq Depart of Army for not properly supervising the Board for Corrections of Military Records (ABCMR) operating "improperly without authority" in permitting the "Examiner" to authenticate for the Secretary's duly appointed Board decision(s), in effect, he is designated the: EXAMINER, "PROSECUTOR, JUDGE, JURY AND EXECUTIONER" -- in this case when he was supposed to be an impartial assistant to the Board; and prepare the case(s) for review of his Supervisor, Secretary of the Board, and review/approval of the Secretary of the Army or his "desig-nated" authority; which, according to FOIA inquiry does not exist; thereby, the Secretary retains this authority, see para. 20, 21, AR 15-185, and, WEISS v. U.S. 408 2d 416, 187 Ct Cl. See ABCMR memo Appendix "A" attached.

2. It is obvious the Congress did not intend for the same person to review and

approve the original proceedings to be corrected or reviewed by the ABCMR; and, in effect, decide the outcome of the action on whether he himself is in error. Such procedure deprives the requirements that the Secretary act through his appointed civilian "boards" for real significance of effect for those performing, by default of the Secretary Army's functions, 10 U.S.C. $5148, 1552 (a). (Hertzog v. U.S. 167 Ct. Cl. 377, 385 (1964). The record is clear that the examiner relied upon DESPER and JAG opinion(s) without substance; and, substantial evidence, not considered on the MERITS for JUSTICE. (Hertzog v. U.S. supra.) Further, in his report it is obvious that he was bias in his report in support of the bias, prejudicial IG report disregarding his duty/responsibility and functions as an impartial member of the ABCMR; opinion induced and influenced by Military Advisors's

memo(s); became all the real evidence and "Commanders" recommendation for relief provide no evidence in support of his position. Please see Appendix "B" Brief of Appellant, Apr 14, 1986; and Appendix "C" Brief for Appellee; and Appendix "D" Reply Brief of Appellant. It is obvious Examiner failed to verify the record.

3. The first litigation in Huntzinger v. U.S. did not portray the overall records of 23 years 7 months "outstanding" combined USA, AUS, USAR military service of Huntzinger; but, was incomplete relying on the Defendant's motion adopted from the ABCMR, JAG, DESPER opinion(s) which were not"qualified" in accordance with U.S.C. 10 $5706; therefore, Huntzinger claims that the information obtained after the litigation action through further persistence pursuing FOIA, Privacy and Sunshine Act(s) in support his theory that the ABCMR, ADB, and promotion

selection board(s) action were "invalid" because it did not have the proper statutory "record" before it which were contained with in "IG", sequestered, secret personnel action classified "by law" records with the knowledge of the Board(s) but, denied access to Huntzinger. See Weiss v. U.S. 408 F 2d 416 (1969). Further the Board(s) disregarded instruction(s) issued by Secretary of the Army; and regulatory directives and statutes. See Biddle v. U.S. 1968 Ct. Cl. 87, 186, UCMJ & AR 15-185.

4. Huntzinger assumed that everything was regular and discovered after the case was over and the Claims Court opinion was final--only to further discover AFTER THE LITIGATION WAS OVER, after further FOIA requests, he discovered it was "irregular" not considered in light of JUSTICE. There was no way for him to tell from the base

of the record, the irregularity that the "Ct" would adopt the report of the EXAMINER that was "Judge, Jury and Executioner", in which he, the "impartial" examiner, was in fact his prosecutor, judge, jury, executioner in this case when he was supposed to be an impartial assistant to the Board. Huntzinger was in dispute between himself and the government over the facts with the ABCMR which were not decided in the last case.

5. The dispute between Huntzinger and the Government over the facts--what was decided the last time, the continued conceal-ment, government cover-up of the facts, further protected concealment by the Board. The point is that the time element in litigation was prolonged because of the "secret" action by the government and, their continued cover-up, concealment or avoiding full compliance with FOIA, Privacy or

Sunshine Act(s) requested.

It is recognized that the Courts have recognized that there is no "recourse" by litigation of act(s) by the Active Duty Board, if properly accomplished--this action is final and upheld by the Courts, which is proper. The military must have means to rate efficiency of their personnel and accommodate RIF programs. But, they must be compelled to comply with their own directives, regulations, U.S. Statutory Code(s), allowing "due procedural process" and protection of the soldier's rights provided by the Uniform Code of Military Justice and/or his constitutional guaranteed right which he defended. In fact, that's what this case is, simply, the difficulty of JAG, DESPER opinions "arbitrary - capricious" without substance or evidence of records to substantiate their opinion in conflict with Army's records encountered in resolving a whole series of questions

in connection with the whole relationship with the Army has been the inability to gain access and/or cooperation to gain access to information and resolve conflict opinion v. record(s) there is no alternative but to wait until finally granted access before filing litigation.

6. The Court may assume in good faith, that collusion, conspiracy or in effect, at least the ABCMR continued the "concealment" from Huntzinger and/or Congressional inquires. That is the impact of the irregularity as opposed to having an impartial review of the case merits.

7. The courts have taken the merits of "untimely filed" into consideration that should have been known in 1960 which Huntzinger disputes saying "No, I couldn't know. It was classified, it was privileged information." It was

fraudulently concealed, that was the case that was decided the last time. The last time Huntzinger was trying to litigate he was trying to get the Board to consider whether in fact there was fraudulent concealment. The order of the Board said that there was no fraudulent concealment, that he should have known in the beginning; which, he could not have known since the "for cause" action was in "secret" without his specific knowledge--classified--sequestered. It was his assumption that, that the ADB and ABCMR decision even though he disagreed with it, it was fairly reached, was reached in good faith; was fair and reached in good faith; therefore, appeal to the Federal Circuit was that the case to the Claims Court and appeal was based on factual and legal errors by the ABCMR, not procedural irregularities there, only to discover that the proceeding that he thought was fair, wasn't fair at all

after the other case was over. And he could not have discovered it in time and he discovered that only by accident after the fact. But not accident but by his persistence after the fact. Since he never got a "fair hearing" on the fraudulent concealment, the issue now is not whether there was fraudulent--AND THIS IS THE KEY RIGHT HERE, the issue now is not whether there was fraudulent concealment which was "case one", the issue is not whether Huntzinger had a "fair hearing" of that issue before the ABCMR; and that is a completely different issue. He didn't win on the fraudulent concealment issue but now has a "right" to a fair hearing somewhere. And that is the relief wanted before this Honorable Court. Unless the Court itself believes that the evidence of fraudulent concealment is so overwhelming that it can rule in that vein without remand for that such a hearing. He now says that as a matter of law that

there was fraudulent concealment. We can say that as well as at the ABCMR. So...there is no need to remand it because he is not going to get a fair hearing there. Huntzinger has been "jerked" around by these people so much and for so long that there is no reason to believe that he will not be "jerked" around again.

8. Therefore, Huntzinger respectfully requests this Honorable Court to protect his right to do that: the first question "was there fraudulent concealment?" The question now is "did he get a fair hearing on that question before the ABCMR?" The Secretary of the Army is responsible by law to appoint a Board for correction of military records in accordance with his charge by the United States Congress through statutory code to be accomplished in light of "justice" they did not legislate mandatory that "date of separation" is applicable in

all inclusive cases of separation where exists cover-up, concealment and fraudulent illegal, wrongful action under the theory that the "information" of government wrongdoing is common knowledge---even though it is accomplished under "sham"; classified, "in secret action"; hence, sequestered, and recorded on the record as hoodwinking - deception means of "annual screening" AR 135-173 by an Active Duty Board in accordance with government regulation to avoid a politically potential "fire" of fraudulent, cover-up and concealment of an alleged "for cause action" with denial individual soldier's entitlement to "due procedure process", counsel and protection of his constitutional guaranteed rights. The Congress did provide for justice to toll the "timely filed" requirement until discovery. The Court(s) differ in opinion and this Honorable Court's attention is invited to the Yale Law

Journal article by Mr. Saul B. Shapiro submitted "Amicus Curiae".

Summary

1. The U.S. District Court in accepting the motion by the Army of "Res Judicata" did not have the benefit of all the facts, since the case of Huntzinger v. U.S. 9 Ct Cl 90(1985) reflects err of facts; and limited its discussion to defendant's motion for summary judgment basis of "untimely filed" without consideration of the MERITS of the case; which, Huntzinger could not "prove" because of U.S.'s motion to deny his right of "deposition, discovery, admission" granted by the Court, appealed by Huntzinger's motion denied. See Motion.. Appendix "G" and "H" of letter explanation with two volumes of document(s).

2. The first case of Huntzinger v. U.S. 9 Ct Cl. 90 (1985) was based upon the

government's (Army) illegal, wrongful, and fraudulent action by "SHAM" of annual screening pursuant to AR 135-173 and 135-215; when in fact it was "for cause" based upon a nine month rating period versus a combined outstanding service (RA-AUS-USAR) record of 23 years 11 months 27 days; for "cause" action basis of a bias, prejudice Inspector General investigation finding and recommendation forwarded illegally to the DA Active Duty Board without qualification for selection Board consideration under AR 640-98 and USC 10 $5706.

3. That the ABCMR is not properly functioning/supervised in accordance with the intent of Congress by one examiner--acting as prosecutor, judge, jury, executioner and judicial review authority in passing judgement of his own work, authenticity, approval of the violation Secretary Army AR 15-185, U.S.C. 10 $1552.

4. The point here is that the District Court interpreted claims as going back to the merits of what happened in 1958, which is what was before the Claims Court. In fact, this case was based upon the irregularities discovered in the ABCMR procedure. The point is that the rule of law is different than the law applied to the other case, focusing on the irregularities that were discovered since the last appeal. That is what this case is about, with intermittent discoveries through FOIA, Privacy and Sunshine Act(s) of further government cover-up, concealment and fraudulent action--vividly cited by Mr. Saul B. Shapiro in the Yale Law Journal Vol 95: 1477, 1986 submitted "Amicus Curiae" "Citizen Trust and Government Cover-up: Refining the Doctrine of Fraudulent Concealment" submitted to this Honorable Court, reflects the various Court opinions on the subject that are cited therein.

5. That the ABCMR memo of consideration adopted by the Court(s) through defendant's motion(s) for summary judgment without hearing of the case on the MERITS which appeared was regular--discovered after the case was over that it was irregular; and, the irregularities is that the ABCMR examiner was "examiner, prosecutor, judge, jury, executioner" in this case when it was intended that he be an impartial assistant to the Board-- but in fact his action became the opinion(s) of the Court without verification of the facts--very, very difficult to accept under our judicial system established under the United States Constitution to prevent such action and can be related to U.S. v. Oliver North (indicted) (referred to in order to demonstrate influence when individual "assumes" unlimited authority)--appears a similarity (?) reflected at the ABCMR? In search of "justice" as provided by

US Congress in U.S.C. 10 $1552, denied, by fraudulent, concealment, cover-up, deception, by "hoodwinking." Documents quoted "non-existent" per HQ DA!

6. When a COMPLAINANT files litigation; hence, denied his right to "Deposition, Discovery and Admission" it reflects the condoning government cover-up, concealment, and fraudulent actions and he cannot prove it when these rights are denied and "procedural due process" guarantees are not followed by the government, and right of "hearing"--denied of his requested witnesses--deposition, discoveries, admission, by interrogatories.

Conclusion

1. That the District Court opinion was made in good faith based on the Claims Court record, not knowing of the err in errors. Opinion based on 9 Ct Cl 90 (1985) without benefit of all issues.

2. That the second case, for reasons stated herein, is not Res Judicata because it is based on information discovered and "developed" after the first case and appeals were concluded under different laws, different issues and basis of litigation, recognized fact that these changes are specifically for malfeasance in office; and neglect of government officials it is deemed that such officials must be responsible for their acts; therefore, reason for this litigation action directed against the Secretary Army and Hqs DA, et al, recognized as part of the "US government."

3. That the ABCMR knowingly of the "IG" findings and recommendation "for cause" action delayed advising Huntzinger until 7 Jun 1983, permitting the "false impression" that he was separated basis of the Fort Hood OERs by "annual screening" of the Active Duty Board--prolonging the government's concealment/

cover-up by deception now discovered NOT true; but was a "secret" SHAM alleged "for cause" not supported by the Army's record(s) and "official" personnel file; hence, to plea "UNTIMELY".

4. That the ABCMR "Examiner acted as: PROSECUTOR, JUDGE, JURY, EXECUTIONER, AND JUDICIAL REVIEW BY HIS AUTHENTICATION OF THE BOARD'S ACTION FOR THE SECRETARY OF THE BOARD, FORWARDED FOR THE SECRETARY OF THE ARMY for notifi-cation of Applicant, violation Board's Regulatory authority--AR 15-185, para 20-21.

THEREFORE, Appellant Huntzinger prays for relief as claimed in the basic Compliant-Petition, or as this Honorable Court deems appropriate, and/or promotion as punitive damages authorized by the ABCMR consideration JUSTICE.

DATED: 27 April 1988.

BY: I. J. HUNTZINGER, Pro se

CERTIFICATE OF SERVICE

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28 April 1988

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CERTIFICATE OF SERVICE

I certify that I have this 15th day of December 1988 deposited in the United States mail a copy of this document, postage prepaid, first class, addressed to: (cert.)

Ms Paula Mary Potoczak, Esquire
Assistant, United States Attorney
701 Prince Street
Alexandria, VA 22314

and,

The Solicitor General
of the United States
Department of Justice
WASHINGTON DC 20530

I. J. HUNTZINGER
Pro se